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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

The Honorable RICHARD A. WARMUTH,

Appellant,

v.

DAVID ALAN JONES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

CHAUNCEY H. BROWNING
Attorney General

S. CLARK WOODROE
Assistant Attorney
General and Counsel
of Record

RICHARD S. GLASER, JR.
Assistant Attorney
General

State Capitol, Room 26-E
Charleston, West Virginia
25305
(304)348-2021

COUNSEL FOR APPELLANT

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QUESTION PRESENTED

Can a state validly impose a further condition upon the federal extradition power by holding that a fugitive will not be delivered over to the demanding state solely because unsoundness of mind allegedly unfits him to assist counsel in challenging the extradition proceed-'ing?

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* The State of West Virginia, only nominally a party below, is not a party here. The only parties are the Honorable Richard A. Warmuth, appellant, and David Alan Jones, appellee.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

State ex rel. David Alan Jones v. Honorable Richard A. Warmuth, Judge, etc., No. 14893, filed November 25, 1980, by the West Virginia Supreme Court of Appeals. This opinion is as yet unreported, and it is attached hereto as "Appendix A."

In Re: David Alan Jones, Extradition, Memorandum of Opinion of the

Circuit Court of Marshall County, West Virginia, May 29, 1980. This opinion is unreported, and is attached hereto as part of "Appendix B."

GROUNDS OF JURISDICTION

This is an appeal from a prohibition proceeding in which the Supreme Court of Appeals of West Virginia granted a writ barring appellant from permitting the extradition of appellee to Oklahoma, where he had allegedly committed a crime. Prohibition was granted despite the fact that all federal requirements and applicable West Virginia Code Sections, including the Uniform Criminal Extradition Act, had been complied with. The West Virginia Supreme Court of Appeals' ground for prohibiting the extradition of appellee was solely that he needed further findings as to whether he lacked "mental

competency to understand the proceeding and to consult with and assist his counsel in such proceeding." (Opinion p. i.) This ground has generally been held non-cognizable in extradition law, which is federal and derives from the Constitution of the United States, Article 4, Section 2, clause 2, as implemented by 18 U.S.C. § 3182.

The decree of the West Virginia Supreme Court of Appeals herein was entered November 25, 1980. Notice of appeal was filed December 9, 1980, in the Supreme Court of Appeals of West Virginia.

This Court's jurisdiction over this case derives from 28 U.S.C. § 1257(1). Cases sustaining this jurisdiction include Michigan v. Doran, 439 U.S. 282, 58 L. Ed. 2d 521, 99 S. Ct. 530 (1978); Seaboard Air Line R. Co. v.

Daniel, 333 U.S. 118, 92 L. Ed. 580, 68 S. Ct. 420 (1948); and Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204, 90 L. Ed. 1172, 66 S. Ct. 992 (1946).

STATUTES, ETC., INVOLVED

1. United States Constitution, Article IV, Section 2, Clause 2:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

2. 18 U.S.C. § 3182:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person

> demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

STATEMENT OF THE CASE

The appellee, David Alan Jones, is charged by the State of Oklahoma with the commission of second degree murder. The Oklahoma felony information was filed on May 30, 1979, charging appellant with commission of the offense, within the State of Oklahoma, on May 17,

1979. A fugitive from justice warrant was issued in Marshall County, West Virginia on May 30, 1979, and appellee was picked up and lodged in the Marshall County jail May 31.

On June 25, 1979, the Governor of Oklahoma issued a requisition for extradition. Attached thereto were the preliminary felony information, the arrest warrant, four supporting affidavits and a photostatic reproduction of Article II, Section 17 of the Oklahoma Constitution. On July 10, 1979, the Governor of West Virginia issued a warrant for appellee's arrest and ordered his extradition.

Appellee undertook to challenge the legality of the entire extradition proceeding. At a hearing before the Circuit Court of Marshall County on July 31, 1979, counsel for appellee stated his intention to challenge extradition by

writ of habeas corpus. He further petitioned the court for a determination of appellee's mental competency pursuant to Chapter 27, Article 6A, Section 1 of the Code of West Virginia of 1931, as amended. No further statutory or case authority for this proposal was cited by counsel for appellee, the Prosecuting Attorney, or the Judge.

Initially, the prosecuting attorney did not oppose a psychiatric evaluation for appellee. Dr. David Hill concluded that appellee's mental state was such that "it may be difficult for him to assist his counsel," and that his loss of memory "might also hinder his ability" to assist in his own defense. Dr. Robert Mendelson found that appellee was capable of assisting his counsel.

This division of conclusions led appellee to move, on February 25, 1980,

for an additional independent examination. Appellant, the judge in this proceeding, granted this motion. The third doctor called upon concluded that appellee was "presently unable to assist his lawyers regarding his presence in Oklahoma or regarding the nature of his behavior when he was there."

Subsequently, at a May 5, 1980, hearing, the prosecutor raised the issue of the relevancy of mental competency to extradition proceedings. Upon considering memoranda of law by opposing counsel, the court, appellant here, ruled that competency to participate and assist counsel in an extradition proceeding is "irrelevant and cannot be raised by the defendant." A copy of this order is attached hereto as part of "Appendix B."

On June 5, 1980, appellee, by counsel, appeared before the Supreme

Court of Appeals of West Virginia and prayed for a writ of prohibition to prohibit appellant from permitting his extradition. The Court issued a rule to show cause returnable September 9, 1980. Pursuant to an extension of time granted, the matter was argued October 7, 1980. On November 25, 1980, the Court filed its opinion and awarded the writ of prohibition as molded. From the award of this writ appellant brings this appeal.

WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary nothwithstanding." Constitution of the United States, Article VI, paragraph 2.

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Constitution of the United States, Article IV, Section 2, Clause 2 (emphasis supplied).

In a small, but terribly significant way, this case addresses a frontier question under the Supremacy Clause. It is elementary law that a state court of last resort may impose more, or broader, constitutional guarantees than does the federal system. But may it do so when that broadened guarantee--in this case to be able to work effectively with counsel--squarely conflicts with an obligation among the states graven in the very words of the Constitution itself--in this case the requirement for extradition of fugitives?

Extradition is an essential element in our national legal fabric. "It articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Article IV" and thus sought to preclude the "balkanizing" of the administration of criminal justice. Michigan v. Doran, 439 U.S. 282, 287-8, 58 L. Ed. 2d 521, 526-7, 99 S. Ct. 530 (1978). As might be expected, it is kept extremely simple. A governor's grant of a requested extradition "is prima facie evidence that the constitutional and statutory requirements have been met [citing case]. Once the governor has granted extradition, a court considering release on habeas corpus [the only means of attacking extradition] can do no more than decide (a) whether the extradition

documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." Michigan v. Doran, supra, 439 U.S. at 289, 58 L. Ed. 2d at 527.

In the instant case, appellant and his predecessor were called upon to hear a habeas corpus petition on behalf of appellee. Before proceeding to the merits, appellee entered evidence that he lacked mental capacity to assist his counsel in litigating his identity and his former presence in the demanding state. He did not suggest the possibility of determining these questions from third-party sources.

Appellant's court ruled that the question of mental competency was irrelevant to the four extradition questions, but was prohibited from proceeding further by the Supreme Court of Appeals of West Virginia.

In Drew v. Thaw, 235 U.S. 432, 59 L. Ed. 302, 35 S. Ct. 137 (1914), this Court was confronted with an analogous "insanity defense" to extradition. Ore Thaw and others escaped to New Hampshire from a mental hospital in New York. New York indicted Thaw for conspiracy to escape and sought extradition, which the Governor of New Hampshire granted, but the New Hampshire and lower federal courts would not permit, discharging Thaw instead on habeas corpus. On appeal to the Supreme Court of the United States, the order of discharge was reversed.

The appellee, Thaw, contested extradition on many grounds relating to insanity, although he did not make inability to assist his counsel a particular point of defense. His basic argument was that if he was insane, he could not have committed a crime for which extradition lay, whereas if he were not insane, his confinement in a mental institution was invalid and his escape legal.

Delivering the opinion of the Court, Justice Holmes made short shrift of Thaw's contentions. Whether Thaw could make an insanity defense was "for the New York court to decide." 235 U.S. at 440.

Holmes was more concerned with the very important policies underlying the extradition laws. He wrote:

"In extradition proceedings, even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the state having jurisdiction of the crime. [Citing cases] There is no discretion allowed, no inquiry into motives. * * *" 235 U.S. at 339, 59 L. Ed. at 307.

Consequently, Justice Holmes concluded:

"When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial

> in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once." 235 U.S. at 440, 59 L. Ed. at 308.

These two cases, Michigan, supra, and Drew, supra, underscore the importance and emphasis our constitutional order place upon keeping the extradition process as simple as possible--upon limiting the question strictly to the four basic essentials of the formal order of documents, the criminal charge, identity of the prisoner, and whether the prisoner is a fugitive. It would be gilding the lily to say more about how essential this simplicity is to the interstate administration of criminal justice, or about how wise and important a principle the framers discovered when they devised our extradition system.

The decision below casts a monkey wrench into the core of simple, effective extradition procedures. It permits any fugitive to raise a defense--airtight if proven--to extradition on an extraneous mental health ground. Under extradition law as we know it, both competency to stand trial and capacity to commit the offense charged are to be determined by the courts of the demanding state. Here, that state's needs can be completely thwarted on a plea of incompetency to assist counsel in resisting extradition. This, despite the obvious fact that as a practical matter the four prerequisites to extradition are almost always verifiable without the assistance, or objection, of the accused or his counsel. In short, a technical monkey wrench.

Although the instant question is new, West Virginia is not the first jurisdiction to have considered it. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), has been held not to apply to extradition rendition proceedings. United States v. Flood, 374 F.2d 554 (2nd Circuit, 1967). Ohio long ago held generally that insanity was irrelevant to an extradition proceeding. State v. Owen, 133 Ohio 2d 90, 12 N.E.2d 144 (1937). Kentucky has also so held. Kellems v. Buchignani, 518 S.W.2d 788 (1974). Colorado has reserved judgment on the question. Luker v. Koch, 489 P.2d 191 (1971). And Alaska, like West Virginia, would let mental illness defeat extradition. Kostic v. Smedley, 522 P.2d 535 (1974).

In the harmony of the Constitution, of 28 U.S.C. § 3182, of the decisions of this Court, and of the Uniform Act, one still sees the unitary simple grandeur of the federal extradition scheme. Yet underneath, the block is beginning to crack. Alaska, West Virginia--will the cracks proliferate? There is division on a critical point, to say the least. There is present, at least remotely, the spectre of "balkanization"--of the chaos in criminal rendition proceedings the founders sought to avoid.

It is respectfully submitted that these questions are substantial, and that a few words from this Court could rectify and clear up this deteriorating situation. It is moreover respectfully submitted that this case is ripe for the exercise of Supreme Court jurisdiction.

CONCLUSION

For the reasons above noted, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

CHAUNCEY H. BROWNING
Attorney General

S. Clark Woodroe

S. CLARK WOODROE
Assistant Attorney General and Counsel of Record

RICHARD S. GLASER, JR.
Assistant Attorney General

State Capitol, Room 26-E
Charleston, West Virginia
25305
(304)348-2021

Counsel for Appellant

APPENDIX A

APPENDIX "A"

(IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA)

NO. 14893

STATE EX REL. DAVID ALAN JONES

v.

HONORABLE RICHARD A. WARMUTH, JUDGE, ETC.

Prohibition Writ As Moulded Awarded

Miller, Justice

In order to give meaning to a fugitive's right to test the legality of his arrest on the issue of his identity and presence in the demanding state at the time the crime was allegedly committed, and to give meaning to his right to have legal counsel, it is essential to due process under Article III, Section 10 of the West Virginia Constitution that such person has sufficient mental competency to understand the proceeding and to consult with and assist his counsel in such proceeding.

Miller, Justice (:)

In this petition for prohibition the relator, David Alan Jones, raises the issue of whether his claim of insanity may be considered as grounds for opposing extradition.

The relator was charged by the State of Oklahoma with the commission of second degree murder. The Oklahoma felony information was filed on May 30, 1979, charging the relator with the commission of the offense, within the State of Oklahoma, on May 17, 1979. Upon notification from Oklahoma authorities, a magistrate of Marshall County, West Virginia, issued a warrant for the arrest of the relator. Pursuant to the Marshall County warrant, the relator was taken into custody.

On June 25, 1979, the Governor of Oklahoma requested the relator's

extradition from West Virginia, in accordance with the provisions of W. Va. Code, 5-1-7, in order to bring the relator to trial in Oklahoma.

An extradition hearing was held in the Circuit Court of Marshall County on July 31, 1979. Counsel for the relator stated his intention to challenge extradition by writ of habeas corpus under W. Va. Code, 5-1-9, and requested the Circuit Court to order a psychiatric examination of the relator. The psychiatric examination was alleged to be necessary, in light of the relator's history of mental illness, to determine if he would be capable of assisting his counsel in the challenge to extradition.

The prosecuting attorney agreed that the relator's record reflected a history of mental illness, and did not oppose the motion for psychiatric

examination.[1] Consequently, the Circuit Court granted the motion for an examination to determine competency and directed

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1. The transcript of this hearing contains the following dialogue:

> "THE COURT: ...
>
> "Is the petition to determine competency in any way resisted, Mr. Karl?
>
> "MR. KARL: No, Your Honor, for several reasons. In conferring with the members of the sheriff's office, I am aware of the defendant/petitioner's confinement at the Northern Panhandle Mental Health Center on at least three occasions; further, I am aware of an attempted suicide by hanging while the petitioner was incarcerated in the Marshall County jail; and in addition, there has been recently filed an application for involuntary commitment, which is as a matter of fact, set for a probable cause hearing. So for these reasons the State would not resist, and in addition, for the serious nature of the offense he is charged with."

that the relator undergo psychiatric examination by Dr. David Hill and psychological examination by Dr. Robert Mendelson. The court instructed that the examination focus upon the relator's "competency to assist his counsel in preparing a Petition for a Writ of Habeas Corpus, and further as to his competency to participate and assist his counsel in a hearing in such a Habeas Corpus proceeding."

After his examination, Dr. Hill concluded that the relator's mental state was such that "[i]t may be difficult for him to assist his counsel" and that his loss of memory "might also hinder his ability" to assist in his own defense. Dr. Mendelson, on the other hand, found that the relator was capable of assisting his counsel.

In light of the apparent conflict in the test results, the relator moved, on February 25, 1980, for an additional, independent psychiatric evaluation. The Honorable Richard A. Warmuth, who had replaced the Honorable Stephen D. Narick in the case, granted the motion for further independent evaluation.

Upon independent evaluation, Dr. Jonathan Himmelhoch concluded that the relator was "presently unable to assist his lawyers regarding his presence in Oklahoma or regarding the nature of his behaviour [sic] when he was there."

At a subsequent hearing on May 5, 1980, the prosecutor raised the question of whether the issue of mental competency is properly within the scope of inquiry in extradition proceedings. Upon considering opposing counsels' memoranda of law, the court ruled on May

29, 1980, that competency to participate and to assist counsel in an extradition proceeding is "irrelevant and cannot be raised by the defendant.[2]

The relator then applied to this Court for a writ of prohibition in order to prevent the Circuit Court of Marshall County from proceeding further without determining first whether the relator is competent to participate and assist counsel in the extradition proceeding.[3]

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2. Relator attempts to raise the question that Judge Warmuth's ruling overturned Judge Narick's order in regard to the insanity issue. We do not read the record as raising the issue. Both judges had initially permitted psychiatric examination of the relator because the prosecuting attorney did not object to the examinations. It was only when the prosecutor raised the question of relevancy of the insanity issue that the trial judge decided the point. The case at this time was before Judge Warmuth.

3. Since the matter involved a pure legal issue meeting the functional criteria set out in Hinkle v. Black, W. Va. , 262 S.E.2d 744 (1979), and

Article IV, Section 2 of the United States Constitution sets forth the basis for extradition between the states:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

Because of the constitutional basis for extradition proceedings, the United States Supreme Court has established limitations on the scope of the inquiry

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the cases therein cited, we granted a rule to show cause. The action taken in this case should not be considered as an invitation to utilize prohibition to contest a judge's preliminary finding of no insanity when the issue has been heard. See State ex rel. Williams v. Narick, W. Va. , 264 S.E.2d 851, 857 (1980); State v. Milam, W. Va. , 260 S.E.2d 295, 301 (1979). In this case, we deal with the substantive right to raise the insanity issue.

that may be pursued in a state court by an accused in resisting extradition. In Michigan v. Doran, 439 U.S. 282, 289, 58 L.Ed.2d 521, 527, 99 S. Ct. 530, 535 (1978), the Court stated:

> "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable."

We have recognized substantially the same limitations in Syllabus Point 1 of State ex rel. Gonzales v. Wilt, W. Va. , 256 S.E.2d 15 (1979), and Syllabus Point 2 of State ex rel. Mitchell v. Allen, 155 W. Va. 530, 183 S.E.2d 355 (1971), cert. denied, 406

U.S. 946, 32 L.Ed.2d 333, 92 S. Ct. 2045 (1972):

> "In habeas corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers.[4]

---

4. Despite variations in phrasing, the scope of inquiry set forth by the United States Supreme Court in Doran and this Court in Wilt and Mitchell are, in essence, the same. It may be noted that one clause of our formulation is "whether the petitioner was present in the demanding state at the time the criminal offense was committed," whereas the counterpart in the federal formulation states "whether the petitioner is a fugitive."

In Hyatt v. New York ex rel. Corkran, 188 U.S. 691, 47 L.Ed. 657, 23 S.Ct. 456 (1903), the United States Supreme Court pointed out that determination of whether an accused is a

The relator's argument in the present case is that, in order to conduct a fair inquiry into these aspects of extradition, the relator must be competent to understand the nature of the proceedings against him and be able to assist his counsel on his own behalf. The competence of the relator to assist

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"fugitive" is based upon an inquiry into whether "he was within the demanding state at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction." 188 U.S. at 713, 47 L.Ed. at 662, 23 S. Ct. at 460.

Similarly, in Moncrief v. Anderson, 342 F.2d 902 (D.C. Cir. 1964), the court held that "Fugitivity means presence in the demanding state when the crime was allegedly committed." 342 F.2d at 904. See also, Hogan v. O'Neill, 255 U.S. 52, 65 L.Ed. 497, 41 S.Ct. 222 (1921); Appleyard v. Massachusetts, 203 U.S. 222, 51 L.Ed. 161, 27 S.Ct. 122 (1906); Fowler v. Ross, 196 F.2d 25 (D.C. Cir. 1952).

Consequently, it is apparent that the difference in the West Virginia and the federal formulation is in reality only alternate expressions of the same points.

his counsel would be particularly relevant to those factual issues where the relator's own knowledge is necessary: his presence in the demanding state at the time the offense was committed, and the identity of the relator as the person named in the extradition papers.

This issue is new to us and rarely has been raised or discussed by other courts. The State refers to a number of decisions for the proposition that mental competence is not a proper issue for consideration in an extradition proceeding. See Drew v. Thaw, 235 U.S. 432, 59 L.Ed. 302, 35 S.Ct. 127 (1914); Charlton v. Kelly, 229 U.S. 447, 57 L.Ed. 1274, 33 S. Ct. 945 (1913); Kellems v. Buchignani, 518 S.W.2d 788 (Ky. 1975); State ex rel. Davey v. Owen, 133 Ohio St. 96, 12 N.E.2d 144 (Ohio 1937). These decisions, however, with

the exception of Kellems, address the question of incompetence at the time the crime was committed, or a present incompetence to stand trial for those charges in the demanding state. They conclude that such insanity issue can and should be raised in the state which seeks to try the offense. They do not address the question of the relator's inability to participate and assist in the extradition proceeding itself. In Kellems, the issue was raised but the court in a two-paragraph opinion, over a vigorous dissent by two justices, indicated that since the insanity issue could be raised in the demanding state "that the question of the mental competence of a fugitive in extradition proceedings is not relevant." 518 S.W.2d at 788.

It is this issue of relevancy that was directly confronted by the Alaska

Supreme Court in Kostic v. Smedley, 522 P.2d 535 (Alaska 1974). The court analyzed its extradition statute, which is similar to ours, and recognized the fugitive's absolute right to counsel to assist him in a challenge to the arrest and detention resulting from the initiation of extradition proceedings. The court concluded:

> "In order to give meaning to the alleged fugitive's right to bring a habeas corpus action to test the legality of his arrest, and to give meaning to his right to demand and procure legal counsel, it is essential to due process that such person has sufficient mental competency to understand the proceedings and to consult with and assist his counsel in such proceedings." 522 P. 2d at 538.

The Colorado Supreme Court addressed the question indirectly in Luker v. Koch, 176 Colo. 75, 489 P.2d 191 (1971), but found it unnecessary to decide the issue under the facts of the case:

> "The only conceivable situation in which a court in the asylum state might be required to consider sanity would be one in which the petitioner is so incompetent as to be totally unable to assist his counsel in a habeas corpus proceeding in connection with a pending extradition. Such a situation is not presented by this record, and we need not therefore pass upon such an issue." 489 P.2d at 193-94.

In Locke v. Burns, W. Va. , 238 S.E.2d 536 (1977), we acknowledged that an extradition proceeding involved a curtailment of liberty:

> "At best extradition means an extended period of detention, involving custody pending administrative arrangements in two states as well as forced travel in between." 238 S.E.2d at 539, quoting Ierardi v. Gunter, 528 F.2d 929, 930 (1st Cir. 1976).

Because of this deprivation of liberty, the Colorado and Alaska courts have concluded that habeas corpus proceedings to test the legality of extradition will

be considered criminal in nature. Kostic v. Smedley, 522 P.2d 535 (Alaska 1974); Mora v. District Court, 177 Colo. 381, 494 P.2d 596 (1972).

Consistent with the criminal nature of the extradition proceedings, the West Virginia statutory provision setting forth the extradition procedure provides that the accused "has the right to demand and procure legal counsel." W. Va. Code, 5-1-9(a). Under this statute, we have concluded that counsel must be furnished for indigents otherwise unable to procure their own counsel. State ex rel. Gonzales v. Wilt, W. Va. , 256 S.E.2d 15 (1979); State ex rel. Sublett v. Adams, 145 W. Va. 354, 115 S.E.2d 158 (1960), cert. denied, 366 U.S. 933, 6 L.Ed.2d 392, 81 S. Ct. 1652. See Note, Indigents Right to Appointed Counsel in Interstate Extradition Proceedings, 28 Stan. L. Rev. 1039 (1976).

Independent of statutes such as W. Va. Code, 5-1-9(a), we have traditionally employed a higher standard of protection for the individual to those proceedings which involve a deprivation of liberty. Recently, in State ex rel. Graves v. Daugherty, W. Va. , 266 S.E.2d 142 (1980), we provided for the right to court-appointed counsel in a paternity suit and set out cases where such right has been similarly extended:

> "Our state constitutional due process right to counsel requires court-appointed attorneys in criminal and civil actions which may constrain one's liberty or important personal rights. Hawks, supra [State ex rel. Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974)] (right to court-appointed counsel in involuntary civil mental health commitment proceedings); Eastern Associated Coal Corp. v. Doe, W. Va., 220 S.E.2d 672 (1975) (right to court-appointed counsel in civil and criminal contempts); Bullett v. Staggs,

> W. Va., 250 S.E.2d 38 (1978) (court-appointed counsel for violation of municipal ordinances); State ex rel. Lemaster v. Oakley, 157 W. Va. 590, 203 S.E.2d 140 (1974) (court-appointed counsel for indigent parents in civil child neglect proceedings); Wilson v. Bambrick, 156 W. Va. 703, 195 S.E.2d 721 (1973) (court-appointed counsel for civil juvenile proceedings). See Note, The Indigent's Right to Counsel In Civil Cases, 76 Yale L.J. 545 (1967). We eschew the rubric of 'criminal' versus 'civil' in determining what process is fair. The characteristics and ramifications of a proceeding, rather than its label, spawn due process requirements."

Nor have we been insensitive to the rights of insane persons. In State ex rel. Walker v. Jenkins, 157 W. Va. 683, 203 S.E.2d 353 (1974), we held that a criminal defendant who has not been convicted could not be held in a mental institution indefinitely for purposes of determining his competency to stand

trial. In State v. Grimm, 156 W. Va. 615, 195 S.E.2d 637 (1973), we broadened the insanity test in criminal cases. State ex rel. Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974), set down standards constitutionally mandated for the involuntary commitment of an insane person. Moreover, we have historically accorded the writ of habeas corpus to an insane person to test the legality of his confinement. Sloan v. Wachtel, W. Va. , 233 S.E.2d 137 (1977); Wright v. Wright, 78 W. Va. 57, 88 S.E. 606 (1916).

The United States Supreme Court has recognized that "the conviction of an accused person while he is legally incompetent violates due process, Bishop v. United States, 350 U.S. 961, 100 L.Ed. 835, 76 S.Ct. 440 (1956), and that state procedures must be adequate

to protect this right." Pate v. Robinson, 383 U.S. 375, 378, 15 L.Ed. 2d 815, 818, 86 S.Ct. 836, 838 (1966).

Once it is recognized that an extradition proceeding does involve incarceration in the asylum state pending a determination of certain key issues, the right to the effective assistance of counsel becomes apparent.[5] Because an

5. In Zambito v. Blair, 610 F.2d 1192 (4th Cir. 1979), cert. denied, 445 U.S. 928, 63 L.Ed.2d 761, 100 S.Ct. 1316 (1980), the court acknowledged in an extradition proceeding that "a judicial finding of probable cause [is] a prerequisite to detention for an extended period of time. Gerstein v. Pugh, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L. Ed.2d 54 (1975)." The court went on to acknowledge that under Michigan v. Doran, 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978):

> "...an asylum state may not itself hold a traditional probable cause inquiry when the extradition documents on their face are in order and when those documents, although they do not set out the supporting facts, establish that there had been, in the

insane person may not possess sufficient rationality to comprehend the nature of the proceedings and to consult and communicate with his counsel, courts have viewed this type of insanity to foreclose the effective assistance of counsel. For this reason, the defendant may not be tried until he has regained his sanity. The historical and constitutional basis for this particular insanity rule is set out in Drope v. Missouri, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975), where the court went on to reconfirm the test for such incompetency previously stated in Dusky v. United States, 362 U.S. 402,

---

demanding state, finding that there was 'reasonable cause' to believe that the individual as to whom extradition was sought had committed the charged offense." 610 F.2d at 1196.

4 L.Ed.2d 824, 80 S.Ct. 788 (1960):

> "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense may not be subjected to a trial.
>
> "Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.' Dusky v. United States, 362 US, at 402, 4 L Ed 2d at 824, 80 S Ct 788." 420 U.S. at 171-72, 43 L.Ed.2d at 112-13, 95 S. Ct. at .

We adopted language similar to Dusky into Syllabus Point 2 of State v. Arnold, W. Va. , 219 S.E.2d 922 (1975). See also State ex rel. Williams v. Narick, W. Va. , 264 S.E.2d 851, 857 (1980).

Although a challenge to an extradition proceeding is limited, there are nevertheless two key factual issues that may be raised: first, whether the fugitive was present in the demanding state at the time the crime was committed, and, second, whether the person held for extradition is in fact the same person who is wanted in the demanding state - the identity issue.

There can be little doubt that the resolution of either of these issues in favor of the fugitive can result in his release from incarceration in the asylum state. In State ex rel. Gonzales v. Wilt, W. Va. , 256 S.E.2d 15 (1979), the accused contested both issues of presence and identity and was able to establish as to identity that the extradition papers contained information that did not match his physical

characteristics but matched those of a relative. We concluded that this showing shifted the burden to the State to prove identity and since the State presented no evidence on this issue the fugitive was entitled to release. Other courts have also recognized the fugitive's right to prevail on such factual issues. Clark v. Warden, 39 Md. App. 305, 385 A.2d 816 (1978); Baker v. Laurie, 118 R.I. 539, 375 A.2d 405 (1977); Ex Parte Spencer, 567 S.W.2d 520 (Tex. App. 1978).

Where the fugitive is in fact so insane that he is unable to consult and communicate with his counsel or understand the nature of the proceeding, his ability to raise such defenses as his presence and identity is completely foreclosed. The proceeding then becomes a procedural shell without substance.

We do not believe that under the foregoing law this should occur.

We, therefore, conclude that in order to give meaning to a fugitive's right to test the legality of his arrest on the issue of his identity and presence in the demanding state at the time the crime was allegedly committed, and to give meaning to his right to have legal counsel, it is essential to due process that such person has sufficient mental competency to understand the proceeding and to consult with and assist his counsel in such proceeding.

We do not believe that this type of insanity issue will unduly delay orderly handling of extradition proceedings.[6]

---

6 We stress again that the insanity issue involved is whether the defendant is presently competent to communicate and consult with his attorney and has a rational understanding of the proceeding. The issue of insanity at the time

Undoubtedly, anytime a fugitive elects to challenge the validity of his arrest and extradition, some delay will be encountered. Such delay attends any adversary proceeding but delay cannot form the reason for abolishing the right to an adversary hearing.

The trial court is free to follow the time periods and procedures of W. Va. Code, 27-6A-1, although this procedure is by no means mandatory in an extradition proceeding. It is clear that the court need only find that from a preponderance of the evidence the fugitive is competent to consult with counsel since this issue is analogous to the preliminary pretrial finding where insanity is raised in a criminal case.

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of the commission of the crime cannot be raised since the ultimate issue of guilt or innocence is not resolved at an extradition hearing.

State ex rel. Williams v. Narick, W. Va. , 264 S.E.2d 851, 857 (1980); State v. Milam, W. Va. , 260 S.E. 2d 295, 299 (1979). If the court conceives that the fugitive is insane in the sense that he does not comprehend the nature of the proceedings and cannot consult with counsel, then commitment can be accomplished under W. Va. Code 27-6A-1, et seq., until he regains his sanity.

For the foregoing reasons, a moulded writ of prohibition is issued prohibiting the circuit court from hearing the extradition proceeding until it determines the sanity of the relator.

Writ as Moulded
Awarded

APPENDIX B

APPENDIX "B"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

In Re: DAVID ALAN JONES
EXTRADITION

MEMORANDUM OF OPINION

An extradition proceeding has been instituted against David Alan Jones seeking to return him to Oklahoma to answer for the crime of murder, second degree.

Counsel for Mr. Jones have raised the question of his mental competency in these proceedings. Their contention is that the accused is entitled to file a petition for a Writ of Habeas Corpus to test the legality of his arrest, under the provisions of West Virginia Code Chapter 5, Article 1, Section 9. Counsel for the accused claim that he is not mentally competent to assist his attorneys in the preparation and presentation of such a petition.

The question then arises as to whether or not the mental competency of the accused is relevant in an extradition proceeding or to put the question in an alternative, can an incompetent be extradited?

Counsel for the accused and the Prosecuting Attorneys have filed memorandums of law to support their respective positions.

An examination of the briefs shows that the weight of authority supports the position of the State; that being that the evidence of the mental competency of the accused is irrelevant in an extradition proceeding.

The two leading cases, in support of this position are Charlton v Kelly 229 US. 447, 57 L Ed 1274, 33S Ct. 945, and State ex rel Davey v Owen, 133 Ohio St. 96, 10 Ohio ops 102, 12 NE 2d 144,

114 ALR 686. In the Kelly case the Court reasoned that the committing magistrate is to determine whether a crime has been committed and whether the evidence indicates that the accused committed it and that upon extradition proceedings an inquiry into the present sanity of the person arrested is improper. In the Owen case the appellate Court in Ohio stated that the Courts of Ohio have no authority in habeas corpus proceedings to consider the question of the present sanity or insanity of an alleged fugitive from justice, but that such question must be determined by the law and Courts of the demanding state.

Also cited in support of the States position is Drew v Thaw, 235 US 432, 59 L. Ed. 305, 33 S Ct. 137, which involved the extradition of an escape from an institution for the insane.

Counsel for the accused cite the dissent in Kellems v Buchignani (Ky), 518 S W 2d 788 (cited in 31 Am Jur. 2d. Extradition, Section 51), however, it must be noted that the majority opinion held that the question of mental competence of a fugitive in extradition proceedings is irrelevant. Counsel for the accused also cites a Colorado case Luker v Koch, 489 P. 2d 191, which contains dicta supporting their position.

Should the accused be remanded in the proceedings, the question of his mental competency to stand trial would be one for determination by the State of Oklahoma.

This Court should determine in an extradition proceeding.

(1) Whether there is a criminal charge pending in another State.

(2) Whether the accused was present in the demanding State at the time of the criminal offense.

(3) Whether the accused is the person named in the extradition papers.

(4) Whether the extradition papers are in proper form.

If this Court makes an inquiry into the mental competence of the accused at the extradition hearing, it is, in effect, substituting its judgment for the Court in the demanding state, which should have the right to rule on the defendants competency to stand trial.

This Court would also be passing upon what, in essence, would be a matter of defense to the criminal charge. If the accused is unable to assist his counsel, because of his mental incompetency regarding events in Oklahoma, i.e. his mental status at the time of the

alleged crime, this is a matter to be decided by a Court of the demanding state and not a matter of defense in an extradition proceeding. For these reasons, this Court finds the mental competency of the accused in these extradition proceeding is irrelevant.

Dated this 25th day of May, 1980.

/s/ Richard A. Warmuth

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

IN RE: DAVID ALAN JONES
EXTRADITION

ORDER

The 29th day of May, 1980, came the State of West Virginia, by Mark A. Karl, Prosecuting Attorney for Marshall County, West Virginia, and as well came the defendant, David Alan Jones, in person, and by G. Charles Hughes, of Madden, Hughes and Whorton, of his counsel, pursuant to an Order made herein on the 5th day of May, 1980.

And the Court, having had under advisement certain matters and having considered the memoranda of the parties and having issued its opinion, telephonically on May 27, 1980, and its MEMORANDUM OF OPINION, dated May 29, 1980, which is hereby ORDERED filed and made part of the record herein.

Now, therefore, in conformity with said opinion and MEMORANDUM OF OPINION, it is ADJUDGED and ORDERED that the issue of the defendant's competency to assist his counsel in preparing a Petition for a Writ of Habeas Corpus and further as to his competency to participate and assist his counsel in a hearing in such a Habeas Corpus proceeding is irrelevant and cannot be raised by the defendant, to all of which action of the Court, the defendant, by counsel, objects and excepts.

Whereupon the defendant, by counsel, moved the Court for a stay of such Order for a period of thirty (30) days from the entry thereof, to enable the defendant, by counsel, to seek relief in the West Virginia Supreme Court of Appeals. And the Court, hearing and perceiving no objection thereto, doth grant said

motion. It is, accordingly, ADJUDGED and ORDERED that the effect of such Order be, and the same is hereby, stayed until June 30, 1980, at 9:30 o'clock, a. m.

Whereupon, this matter came on upon the defendant's MOTION TO DISMISS, this day filed herein and upon argument of counsel. And the Court, after hearing the same, is of the opinion that said motion is not well taken, and the Court doth so find. It is, accordingly, ADJUDGED and ORDERED that defendant's MOTION TO DISMISS be, and the same is hereby, overruled, to all of which action of the Court, the defendant, by counsel, objects and excepts.

It is further ADJUDGED and ORDERED that this matter be, and the same is hereby, reset for June 30, 1980, at 9:30 o'clock, a.m., at which time further

proceedings shall be scheduled herein.

Dated this 29th day of May, 1980.

/s/ Richard A. Warmuth

Judge

Approved for Entry:

/s/ Mark A. Karl
Of Counsel for the State of
West Virginia

/s/ G. Charles Hughes
Of Counsel for Defendant

APPENDIX C

APPENDIX "C"

Filed with Supreme Court of Appeals of West Virginia, Charleston, West Virginia, December 9, 1980; filed with Circuit Court of Marshall County, West Virginia, Moundsville, West Virginia, December 9, 1980.

NO. 14893

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE ex rel. DAVID ALAN JONES,

Relator,

v.

HONORABLE RICHARD A. WARMUTH, Judge,

Respondent

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Honorable Richard A. Warmuth, Judge, the respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the

Supreme Court of Appeals of West Virginia awarding a writ of prohibition against this respondent, entered in this action on November 25, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(1).

CHAUNCEY H. BROWNING
Attorney General

/s/ S. CLARK WOODROE
S. CLARK WOODROE
Assistant Attorney General

/s/ RICHARD S. GLASER, JR.
RICHARD S. GLASER, JR.
Assistant Attorney General

State Capitol, Room 26-E
Charleston,
West Virginia 25305
(304)348-2021

Counsel for Respondent-Appellant.

CERTIFICATE OF SERVICE

I, S. Clark Woodroe, a member of the Bar of the Supreme Court of the United States, hereby certify that the within Notice of Appeal was served upon the State of West Virginia, and David Alan Jones, by depositing a true copy thereof in the United States mails, first-class postage prepaid, this 9th day of December, 1980, addressed to:

TO: The State of West Virginia
Chauncey H. Browning,
Attorney General
State Capitol, Room 26-E
Charleston, West Virginia
25305

G. Charles Hughes, Esquire
Madden, Hughes and Whorton, L.C.
635-Court Avenue
Moundsville, West Virginia

Arthur M. Recht, Esquire
Schrader, Stamp and Recht
816-Central Union Building
Wheeling, West Virginia

/s/ S. CLARK WOODROE
S. CLARK WOODROE

CERTIFICATE OF SERVICE

I, S. Clark Woodroe, a member of the Bar of the Supreme Court of the United States, do hereby certify that I serve the within Jurisdictional Statement upon the State of West Virginia and David Alan Jones, Appellee, by placing three (3) true copies thereof in a United States mailbox, first-class postage prepaid, this 23rd day of December, 1980, addressed to:

The State of West Virginia
Chauncey H. Browning,
Attorney General
State Capitol, Room 26-E
Charleston, West Virginia
25305

G. Charles Hughes, Esquire
Madden, Hughes and Whorton, L.C.
635-Court Avenue
Moundsville, West Virginia

Arthur M. Recht, Esquire
Schrader, Stamp and Recht
816-Central Union Building
Wheeling, West Virginia

S. Clark Woodroe

S. CLARK WOODROE

NO. 80-1034

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

The Honorable RICHARD A. WARMUTH,

Appellant,

v.

DAVID ALAN JONES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS APPEAL

Terence M. Gurley, Esquire
William D. Wilmoth, Esquire
SCHRADER, STAMP, BYRD, BYRUM,
JOHNSON & COMPANION
816 Central Union Building
Wheeling, West Virginia 26003

(304) 233-3390

Attorneys for Appellee

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NO. 80-1034

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

The Honorable RICHARD A. WARMUTH,

Appellant,

v.

DAVID ALAN JONES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS APPEAL

QUESTION PRESENTED

Should the Supreme Court review actions by a state court which rest on adequate non-federal grounds and do not invalidate federal law?

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia (J.S. App. A 1-27) is reported at 272 S.E.2d 446.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered November 25, 1980, granting Appellee's petition for a writ of prohibition. The notice of appeal was filed on December 9, 1980 (J.S. App. C 1-3). The jurisdiction of this Court is invoked solely under 28 U.S.C. §1257(1). (J.S. 3).

STATEMENT

I.

On May 30, 1979, a felony information was filed in the State of Oklahoma charging the appellee with the commission of second degree murder. Upon request of Oklahoma authorities, a magistrate in Marshall County, West Virginia, issued a warrant for Jones' arrest, which warrant was executed. Jones was jailed and remains in the custody of

the Sheriff of Marshall County.

II.

On June 25, 1979, the Governor of Oklahoma requested West Virginia to extradite the appellee to bring him to trial in Oaklahoma.

At the first extradition hearing held in the Circuit Court of Marshall County on July 31, 1979, Appellee's attorney filed a Petition to Determine Competency, it being counsel's belief that Jones was mentally incapable of assisting his counsel in preparing and presenting a petition for a writ of habeas corpus. Consistent with that theory, a psychiatric examination of the appellee was sought by counsel, agreed to by the prosecuting attorney[1], and granted

---

[1]The exchange among counsel and the Court was as follows:

THE COURT: Is the petition to determine competency in any way resisted, Mr. Karl?

MR. KARL: No, Your Honor, for several reasons. After conferring with members of the sheriff's office, I am aware of the defendant/petitioner confinement in the Northern Panhandle Mental Health

by Judge Steven N. Narick, who ordered that the examiners report on Jones' " . . . competency to assist his counsel in preparing a Petition for a Writ of Habeas Corpus, and further as to his competency to participate and assist his counsel in a hearing in such a Habeas Corpus proceeding."

After two psychiatric examinations

Center on at least three occasions; further, I am aware of an attempted suicide by hanging while the defendant/petitioner was incarcerated in the Marshall County Jail. And, in addition there has recently been filed an application for involuntary committment which is, as a matter of fact, set for a probable cause hearing. So for these reasons, the State does not resist and, in addition, because of the serious nature of the offense he's charged with.

THE COURT: Is there any reason why your petition is not verified, gentlemen?

MR. RECHT: Is not verified? Yes, Your Honor, because I'm not really sure whether or not Mr. Jones realizes what is contained in it. It's consistent with our total theory.

resulted in apparently conflicting opinions[2], a third examination was ordered by the appellant Warmuth, who by normal rotation had replaced Judge Narick in the case. The third examiner, Doctor Jonathan Himmelhoch, concluded that Jones was mentally unable to assist his attorneys.

Ten months after the order granting the examination, at a hearing on May 5, 1980, the prosecutor for the first time raised the question of whether mental competency is a relevant consideration in extradition proceedings.[3] Judge Warmuth agreed with the State's position and ruled that competency

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[2]On October 31, 1979, Dr. David Hill (a psychiatrist) filed his report indicating, in essence, that it would be difficult for Jones to assist his counsel ". . . due to his delusion of being God, i.e., if he is God, somehow things will work out without his having anything to do with it." In addition, Dr. Hill indicated that Appellee's loss of memory might also hinder his ability to assist in his own defense.

[3]For the purposes of this motion to dismiss appeal, the issue of estoppel raised by the prosecutor's actions need not be addressed.

to participate and to assist counsel in an extradition proceeding is ". . . irrelevant and cannot be raised by the defendant." (J.S. App. B8).

III.

Jones sought the protection of the Supreme Court of Appeals of West Virginia by filing a petition for a writ prohibiting Judge Warmuth from proceeding any further with the extradition proceedings until appropriate findings be made regarding Jones' competency to function in these extradition proceedings. That petition was granted in the opinion appealed from.

In its opinion, the West Virginia court, speaking through Justice Miller, held:

> In order to give meaning to a fugitive's right to test the legality of his arrest on the issue of his identity and presence in the demanding state at the time the crime was allegedly committed, and to give meaning to his right to have legal counsel, it is essential to due process under Article III, Section 10 of the West Virginia Constitution that such person has sufficient mental competency to understand the

proceeding and to consult with and assist his counsel in such proceeding.

272 S.E.2d at 446.

ARGUMENT

I. The Decision Below Did Not Invalidate Federal Law.

The appellant in his Jurisdictional Statement stipulates that this Court's sole jurisdiction in this matter ". . . derives from 28 U.S.C. § 1257(1)." (J.S. 3).

That provision provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

The opinion below, however, is grounded specifically and solely upon the provisions of Article III, Section 10 of the West Virginia constitution, which provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

While this section obviously bears a marked similarity to the Fifth Amendment to the Constitution of the United States, it is a different and independent provision which provides different and independent protections.

The Supreme Court of Appeals of West Virginia has compared the federal constitutional guarantees with its own and found that the latter encompass and indeed surpass the former.

> Inherent in the due process clause of the State Constitution are both the concept of substantive due process and the concept of equal protection of the laws.

State ex rel. Harris v. Calendine, ___W. Va. ___, 233 S.E.2d 318, 324.

> In the continuously evolving tradition of Anglo-American common law there can be no fixed definition of due process of law, which is an inherently elusive concept; nevertheless, it is apparent that due process of law under the West Virginia Constitution contains an equal protection component the scope and application of which are coextensive or broader than the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L.Ed.2d 389 (1974) which imports the equal protection clause of the Fourteenth Amendment into the Fifth Amend-

> ment to the United States Constitution, the due process language of which is nearly identical to that found in W.Va. Const., art. III, §10. See also Linger v. Jennings, 143 W.Va. 57, 99 S.E.2d 740 (1957), which strongly suggests that W.Va. Const., art. III, §10 affords West Virginia citizens a guarantee of equal protection of the laws as a matter of State constitutional doctrine.

Id. at 324 n.3.

It is clear, then, that West Virginia's constitutional due process guarantees are separate, independent, and more inclusive.

Appellant lists in his Jurisdictional Statement the statutes, etc., involved (the validity of which are mis-alleged to have been brought into question) as U.S. Const., art. IV, §2, cl. 2, and 18 U.S.C. §3182. However, the constitutional clause was acknowledged as controlling by the Court below (272 S.E.2d at 448) and the statute, fairly put, is not even suggested. By the very terms of the jurisdictional statute claimed, when the construction given by the Court below to the federal statute, etc.,

is favorable, no reason exists for review by appeal by this Court. See, e.g., Baker v. Baldwin, 187 U.S. 61 (1902); Missouri ex rel. Carey v. Andriano, 138 U.S. 496 (1891).

For the purposes of an appeal under 28 U.S.C. § 1257(1), it is necessary that the state court directly inquire into and deny the power to pass the statute. See Baltimore & Potomac R. Co. v. Hopkins, 130 U.S. 210 (1889). To be appealable, the state court decision must hold the treaty or statute invalid in whole or in part as applied to the particular circumstances of the case. Flournoy v. Wiener, 321 U.S. 253, 263 (1944).

Certainly, such a holding must be explicit; it is not enough that the state court merely construes the statute, etc. so as to deny a claim thereunder, or that it finds the facts so as to place the situation outside the scope of federal law. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 289-290 (1958). It is even less appropriate under

28 U.S.C. §1257(1) to review by appeal a ruling that clearly does not validate any federal law, but rests solely on state grounds.

II. This Honorable Court Lacks Jurisdiction To Review A West Virginia Decision Resting On Adequate Non-Federal Grounds.

As Justice Jackson wrote in Herb v. Pitcairn, 324 U.S. 117, 125 (1954), "[t]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."

If the West Virginia court decided only a non-federal question, or even if it can fairly be said to have decided both federal and non-federal questions, our doctrine of federalism teaches that the Supreme Court lacks jurisdiction to review if the non-federal ground is adequate to support the ruling. Id. "The reason is . . . found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our

only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." Id. at 125-126.

The Court has several times refused to take jurisdiction where the ground independent of a federal question is sufficient to sustain the holdings of the lower court. Durley v. Mayo, 351 U.S. 277 (1956); Buck v. California, 343 U.S. 99, 103; Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934).

Indeed, even when the basis of the state judgment is somewhat ambiguous, this Court has chosen the interpretation which does not present a constitutional question. Black v. Cutter Laboratories, 351 U.S. 292, 299 (1956).

The Supreme Court of Appeals of West Virginia went to great lengths to show that it acknowledged as controlling the federal constitutional and statutory provisions upon which Appellant seeks to base jurisdiction. All that the West Virginia court did was to add a protection for its

litigants; it is axiomatic that federal constitutional protections are minimums, not maximums. (See J.S. 10).

III. Appellant Has Failed To Show That The Question He Presents Is Either Federal Or Substantial.

As explained above, this case was decided below on a non-federal ground.

However, assuming arguendo that the question is federal, it is necessary to afford the basis for review (by either appeal or certiorari) that it also be substantial. E.g., Dixon v. Duffy, 342 U.S. 33 (1951); Hammerstein v. Superior Court, 340 U.S. 622 (1950); Herb v. Pitcairn, 324 U.S. 117 (1945).

To baldly allege that an appeal presents a substantial federal question is not enough; to say that the broadened state protection afforded Jones below ". . . squarely conflicts with an obligation among the states graven in the very words of the Constitution itself" (J.S. 10) when the West Virginia Court was so careful to find otherwise is simply not sup-

ported by the record.

IV. The Cases Cited By Appellant Are Distinguishable Or Inapposite.

Appellant complains that West Virginia incorrectly applied the teachings of Michigan v. Doran, 439 U.S. 282 (1978). The opinion below speaks for itself:

> In Michigan v. Doran 439 U.S. 282, 289, 99 S.Ct. 530, 535, 58 L. Ed.2d 521 (1978), the Court stated:
>
> "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable."
>
> We have recognized substantially the same limitations in Syllabus Point 1 of State ex rel. Gonzales v. Wilt, W.Va., 256 S.E.2d 15 (1979), and Syllabus Point 2 of State ex rel. Mitchell v. Allen, 155 W.Va. 530, 185 S.E.2d 355 (1971), cert. denied, 406 U.S. 946, 92 S.Ct. 2048, 32 L.Ed.2d 333 (1972):

> "In habeas corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers."

272 S.E.2d at 448.

> Despite variations in phrasing, the scope of inquiry set forth by the United States Supreme Court in Doran and this Court in Wilt and Mitchell are, in essence, the same.

Id. at 448 n.4.

The remaining similar cases cited by Appellant (with one slight exception discussed below) deal with the issue of incompetence at the time the crime was committed, or of incompetence to stand trial in the demanding state. They do not address the issue of the prisoner's inability to assist in the extradition proceedings themselves, meaningfully availing himself of his right to counsel. The slight exception is Kellems v. Buchignani, 518 S.W.2d 788 (Ky.

1975), in which the Kentucky court, in a two-paragraph opinion, held that ". . . the question of the mental competence of a fugitive in extradition proceedings is not relevant." 518 S.W.2d at 788. Appellee directs the Court's attention to the vigorous dissent.

Colorado found the question unnecessary to address directly in Luker v. Koch, 176 Colo. 75, 489 P.2d 191 (1971).

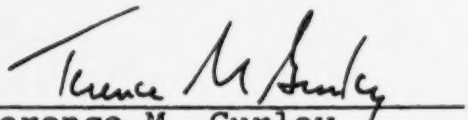
Alaska has confronted the question directly, Kostic v. Smedley, 522 P.2d 535 (Alaska 1974), and has ruled in favor of the rights of the alleged fugitive.

The cracks in the block beneath the ". . . unitary simple grandeur of the federal extradition scheme" alluded to by Appellant at p. 19 of his Jurisdictional Statement are not cracks - they are simply a permissible and separate extension of state constitutional guarantees.

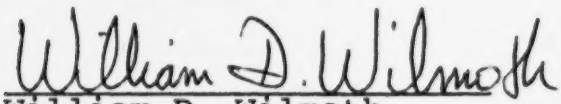
CONCLUSION

For the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,



Terence M. Gurley



William D. Wilmoth

Terence M. Gurley, Esquire
William D. Wilmoth, Esquire
SCHRADER, STAMP, BYRD, BYRUM,
JOHNSON & COMPANION
816 Central Union Building
Wheeling, West Virginia 26003

(304) 233-3390

Attorneys for Appellee

APRIL 13, 1981.

CERTIFICATE OF SERVICE

I, William D. Wilmoth, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the attached Motion to Dismiss Appeal upon the appellant by placing three true copies thereof in a United States mailbox, first-class postage prepaid, addressed to his attorneys as follows:

Honorable Chauncey H. Browning
Attorney General

S. Clark Woodroe
Assistant Attorney General

Richard S. Glaser, Jr.
Assistant Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

this 13th day of April, 1981.

William D. Wilmoth